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Supreme Court, U. S.
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No.

In The

Supreme Court of the United States

October Term, 1980

SALVADOR CHARLES BASSO,
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Solicitor General of
The United States
Department of Justice
Washington, D.C. 20530

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November 18, 1980

QUESTION PRESENTED

Whether liberty interests of a minimaly supervised probationer in the last six weeks of his probation are sufficiently substantial to require that they not be interfered with except upon arrest procedures which meet Fourth Amendment standards or upon use of an order to show cause based upon facts supported by oath or affirmation?

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SALVADOR CHARLES BASSO,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 23, 1980.

OPINIONS BELOW

The opinion of the court of appeals is not yet reported. Excerpts appear in 28 Cr. L. Rptr. 2104 (Oct. 29, 1980). The Slip Opinion is attached as Appendix A. The opinion of the district court was not reported, and is attached as Appendix B.

JURISDICTION

The opinion of the court of appeals was issued on September 23, 1980. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part, as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath

> or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> No person shall be ... deprived of life, liberty or property without due process of law.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.

18 U.S.C. §3653 provides, in pertinent part, as follows:

> At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title, the court for the district in which

> the probationer is being supervised, or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found.

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS.

Petitioner Salvador Charles Basso was charged on March 11, 1975 with two counts of income tax evasion in violation of 26 U.S.C. §7201. The petitioner entered into a plea bargain. The United States Attorney agreed that the government would not protest if the petitioner pleaded nolo contendere and got a suspended sen-

tence. Def's Ex. 3.[1]

This proposal was presented to United States District Judge Robert C. Zampano, who said he would go along if the government disavowed any claim that the untaxed money came from organized crime. Def's Ex. 1. At Judge Zampano's request this agreement was confirmed in a letter to the United States Attorney. A copy was sent to Judge Zampano. Def's Ex. 3; Tr. 180-183.

On January 14, 1977 the petitioner was sentenced on the second count to three years imprisonment and a $4,000.00 fine, the first count to be dismissed, with sentence suspended. Tr. 48. The Court

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[1] The Transcript of the combined probable cause and motion to dismiss hearing held on March 12, 1979 is cited: "Tr. ____." Exhibits offered at that hearing are cited as such, without date. References to transcripts of other proceedings below are cited by date and page: "2/22/79 Tr. ____."

then imposed two years of probation. Def's Ex. 2.

The petitioner was placed under the supervision of U.S. Probation Officer Joseph Gagne. Tr. 21. In January, 1977 Officer Gagne presented petitioner with "Probation Form No. 7" which gave the term and the conditions of petitioner's probation. Tr. 22-23, Tr. 147. Condition No. 2 read "You shall associate only with law abiding persons and maintain reasonable hours." Tr. 101. Officer Gagne recalled giving the petitioner his customary warning to probationers, which was: not to associate with persons who were on probation or parole, or who had criminal records, or who were presently engaging in criminal activity, or who were the probationer's co-defendants in the case in which he was convicted. Tr. 156.

Officer Gagne did not tell the petitioner how to avoid association with persons of this description who were customers of the petitioner's active restaurant and oil businesses. Tr. 157.

Officer Gagne showed his confidence in the petitioner by informing him on July 27, 1978 that henceforth he would report in person only once every three months, as Supervising U.S. Probation Officer Tommaso D. Rendino and Officer Gagne had concluded petitioner's would be a "minimum supervision case". Tr. 58-59. The last meeting with Officer Gagne would thus arise in November, 1978. Tr. 148.

It was at around this time, late July 1978, that another probation officer, Officer Pond, decided that the petitioner had violated his probation. Pond was

supervising Francis Curcio, a probationer suspected of complicity in a drug ring. Tr. 73, 127-28. Pond read an undercover report which said that three men with tangential relationships with Curcio had eaten lunch in petitioner's restaurant. One of the three had reported a talking to Basso about illegal gambling. Tr. 88-89, 73, 127-28. Officer Pond mentioned this report to Officer Gagne. Tr. 89, 150, 158. Officer Gagne made no record in petitioner's file and never mentioned the report to the petitioner. Tr. 89.

In October, 1978 Pond met with Officer Gagne and Officer Rendino to discuss the report. A notation indicating possible violation of Condition No. 2 was made in petitioner's file. Tr. 150. However, Officer Gagne neither contacted petitioner for an explanation nor started

revocation proceedings. Tr. 151. Officer Gagne testified that in fact he had had no problem with the petitioner during the entire period of supervision, Tr. 152, 162, and had learned nothing new connecting him with organized crime. Tr. 163.

Officer Gagne learned in late October that he would be transferred. Tr. 159.

On November 28, 1978, before any general disposition of Officer Gagne's caseload, Pond took over the petitioner's file. Tr. 50, 88, 152. Neither Officer Gagne nor Officer Pond could explain later why the petitioner's file was transferred before the rest. The petitioner's case was the only one, out of all the cases transferred by Officer Gagne, with only a few weeks remaining in the period of probation. Tr. 162.

In November the petitioner visited Officer Gagne for the next to last time. Although Officer Gagne had possessed for a month all of the facts later adduced to justify revocation proceedings, and the report was sitting in petitioner's file, Officer Gagne did not raise the problem with petitioner, ask for an explanation, or even hint that probation might be revoked. Tr. 151. Officer Gagne also kept silent about his departure and the impending transfer of the petitioner's file.

On November 28, 1978 Pond officially became the petitioner's probation officer. The day after transfer Pond put the case for revocation before Supervising Officer Rendino. Tr. 139.

The petitioner came in at Pond's request on December 12th. Tr. 107. It was their first and only meeting. Tr.

95. The petitioner told Pond that the meeting had concerned debts owed him; two of the men were customers of the petitioner's oil business, Tr. 97, and had failed to pay their bills.

Pond did not ask for corroboration or investigate the petitioner's explanation, though he had never spoken to the petitioner before and had no basis on which to judge his credibility. Tr. 124. Pond did not mention to petitioner the matters revealed to him in his Curcio investigations. The very next day Pond made out a Form 12 application to District Judge Robert C. Zampano for a warrant for the petitioner's arrest and revocation of probation. Tr. 107. The application was accompanied by a two page secret memorandum which purported to state the grounds for revocation.

Only a small portion of the memorandum, however, was devoted to the restaurant meeting. The remainder told of the petitioner's supposed ties to organized crime and the background of a totally unrelated drug conspiracy. The thrust of Pond's memo was that the petitioner, a major organized crime figure intimately involved with a drug conspiracy, had initiated a meeting with other criminals to further that conspiracy. Tr. 45. The memorandum was not sworn under oath, Tr. 84, and contained no indication of the source of Officer Pond's information or his basis for considering the source reliable. Tr. 85-86.

Judge Zampano was not shown the reports underlying Officer Pond's statements. 2/22/79 Tr. 9-11. Nor did Officer Pond tell Judge Zampano of the petitioner's explanation for the meeting,

Tr. 97, or the fact that no-one had ever connected Basso with the drug conspiracy. Tr. 97.

Officer Pond and Supervising Officer Rendino met privately with Judge Zampano. Tr. 44. The deficiencies of the memorandum were not made up at the meeting. Officer Pond mentioned the reports on which he relied, but he did not say why he credited his informants' conclusion that Basso was part of a Mafia "family," or connect the petitioner to the drug conspiracy.

Later that week Pond described the alleged violation to a U.S. Attorney, who in turn gave Judge Zampano an oral opinion that this was a violation of Condition 2 which, if proved, would support revocation. Tr. 45-47, 127. Officer Pond resubmitted the Form 12 application for revocation and an arrest warrant.

Both were signed on December 18, 1978. Tr. 47.

B. STATEMENT OF PROCEEDINGS BELOW.

On December 18, 1978, the petitioner was informed of the outstanding probation revocation arrest warrant by the Probation Office, surrendered to the United States Marshals Service, and was released on personal recognizance. The petitione was "arraigned" on December 19, 1978 before District Judge Zampano, at which time his request for a preliminary hearing was granted.

The petitioner moved to dismiss the application and quash the warrant on Fourth Amendment grounds, and for discovery, on January 5, 1979. At a chambers conference Judge Zampano mentioned in passing Officer Pond's confidential memorandum, which had not been provided to the petitioner with the arrest war-

rant. The petitioner asked for the memorandum, but Judge Zampano placed it under seal at the government's request.

On March 12, 1979 another District Judge, Ellen B. Burns, held a combined hearing on both the constitutional issues and probable cause. The petitioner requested that the hearing encompass probable cause because Pond's confidential memorandum, which had been unsealed the previous week, suggested misconduct by Officer Pond in obtaining the warrant.

On November 2, 1979, Judge Burns issued a lengthy and comprehensive ruling quashing the probation violation arrest warrant for failure to meet the requirements of the Due Process clause and the Fourth Amendment. Appendix B. The Government appealed on November 30, 1979.

On September 23, 1980 the Second Circuit, through Judges Lumbard, Mansfield and Mulligan, reversed the district court order and remanded for further proceedings. Appendix A. On October 22, 1980 the same panel, without explanation, issued an "Order Amending Opinion" changing the court's disposition from "Reversed and remanded" to "Remanded." This Order was supplemented with another making minor changes. This petition addresses that portion of the court of appeals ruling which reverses the order quashing the arrest warrant, as that portion of the opinion reversing the district court order dismissing the probation revocation proceeding is now dicta.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court should grant the writ for the following reasons:

1. This case offers the Court the opportunity to clarify the relationship between probationers' liberty interests and their rights to due process of law and arrests not based on probable cause.

2. The decision of the court of appeals is contrary to decisions of this Court guaranteeing that probationers cannot be deprived of freedom without due process of law.

3. This Court has not yet declared what procedures are constitutionally required before a probationer can be deprived of his or her interest in liberty by a probation revocation arrest warrant.

These questions raise important issues of federal law, and the opinion of the

court of appeals calls for the exercise of this Court's power of supervision.

I. THIS CASE PRESENTS THE OPPORTUNITY FOR THIS COURT TO DEFINE THE SCOPE OF PROBATIONERS' LIBERTY INTERESTS AND THEIR RIGHT TO FREEDOM FROM ARRESTS WITHOUT PROBABLE CAUSE AND IN DUE PROCESS.

This court has repeatedly held that parolees and probationers have substantial liberty interests. See, e.g., Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). These liberty interests are determined by the actual degree and type of liberty enjoyed by the parolee or probationer, not formulas such as "constructive custody," or the discredited "right/privilege" distinction. The probationer here had a strong expectation of liberty. He was a "minimum supervision" probationer in the last month of a two year probation period imposed as the result of a plea bargain. He had heard no criticism of his conduct from his probation officer. At the time of arrest the incident relied

upon a revoke probation - a technical violation of conditicns - was over fourteen months old. All these factors suggest that the petitioner's liberty interests approached those of an ordinary citizen.

Yet the record shows the Probation Office stripping the petitioner of his liberty, by issuing a warrant for his immediate arrest, without any of the elementary due process protections accorded ordinary citizens. The warrant application was non-factual, conclusory, and unsworn. It was supplemented with a secret memorandum, also non-factual and unsworn, and off the record conversations. Material information negating probable cause to arrest was intentionally omitted from the memorandum and application. Any one of these defects would invalidate a normal warrant, yet

the court of appeals approved, asserting that the detention of a probationer is "not an 'arrest' for Fourth Amendment purposes." Slip Op. at 5780, App. 12a, quoting United States v. Polito, 583 F.2d 48, 56 (2d Cir. 1978). The court of appeals essentially held that the petitioner was not entitled to any due process protections because the arrest of a probationer does not trigger the Fourth, Fifth and Fourteenth Amendments.

This situation demands correction. At best the court of appeals opinion so minimizes the liberty interests of probationers as to render them meaningless. At worst, it denies them entirely. The district court held that the petitioner's rights entitled him to protection from being taken into custody for revocation of probation without basic due process: either by a warrant, issued on facts

showing probable cause supported by oath or affirmation, or by an order to show cause initiated by an affidavit. Numerous other federal courts (significantly not cited by the court of appeals here) have ruled that parolees and probationers have similar rights against unreasonable searches. See, e.g., United States v. Workman, 585 F.2d 1205 (4th Cir. 1978); United States v. Bradley, 571 F.2d 787 (4th Cir. 1978); Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), cert. denied, 423 U.S. 897 (1975) (Hufstedler, J. dissenting); United States ex rel. Santos v. New York State Board of Parole, 441 F.2d 1216 (2d Cir. 1971), cert. denied, 404 U.S. 1025 (1972). The district court concluded: "[i]f a probationer has certain protectible Fourth Amendment rights vis-a-vis searches and seizures, albeit these rights are less than those accorded

an ordinary citizen, a probationer similarly must have some protectible rights regarding arrests." App. 52a. The petitioner urges this Court to clarify the law and confirm that the Fourth, Fifth and Fourteenth Amendments apply to the arrest of a probationer.

II. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO DECISIONS OF THIS COURT DECLARING THAT PROBATIONERS CANNOT BE DEPRIVED OF FREEDOM WITHOUT DUE PROCESS OF LAW.

The due process guaranteed prisoners, parolees, and probationers by the Fifth and Fourteenth Amendments is the product of careful and sensitive balancing. See Vitek v. Jones, ____ U.S. ____, 100 S. Ct. 1254, 1263-65 (1980), citing, inter alia, Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (sufficient expectancy of parole to require constitutional protection); Enomoto v. Wright, 434 U.S. 1052 (1978) (due process in solitary confinement decisions); Wolff v. McDonnell, 418 U.S. 539 (1974) (loss of good-time credit; solitary confinement; due process protection of liberty interests); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process in probation revocation decision); Morrissey v.

Brewer, 408 U.S. 471 (1972) (due process in parole revocation).

The court of appeals opinion does not employ the balancing of Vitek, Gagnon, and Morrissey. The court of appeals instead extrapolated from a static, preconceived notion of the lowly status and reduced liberty interests of probationers. Slip. Op. at 5780, App. 12a. These interests were so insignificant, in the court's view, that a probation violation warrant could issue without formal process or probable cause. The Fourth Amendment did not apply because the detention of a probationer did not rise to the level of an "arrest."

It cited only one case for this dubious proposition: United States v. Polito, 583 F.2d 48 (2d Cir. 1978). That case concerned the authority to detain a parolee conferred on local police by an

outstanding parole violation warrant directed to federal marshals. The government appealed an order suppressing evidence seized at the time of detention. The Second Circuit reversed, holding that the detention was warranted, and that the local officer could search to protect his own safety. 583 F.2d at 53, 56. In dicta it was asserted that the detention of a parolee was "not an arrest for Fourth Amendment purposes." 583 F.2d at 56.

Polito does not support the court of appeals conclusion here. First, the language cited was dicta containing a specific denial that it encompassed a ruling on the grounds or procedure for obtaining a parole violator arrest warrant. 583 F.2d at 42 n. 3. Indeed, the detention was sanctioned in part because the existence of a valid warrant

issued on satisfactory evidence of parole violation diminished Polito's liberty interests.[2] See 583 F.2d at 55; accord, Henrique v. United States Marshal, 478 F.Supp. 618, 627 (N.D.Cal. 1979).

In the second place, the Polito court relied upon obsolete dicta to support the claim that the Fourth Amendment did not apply to a parole arrest warrant. Polito cited: Jarman v. United States, 92 F.2d 309, 311 (4th Cir. 1937); Story v. Rives, 97 F.2d 182, 188 (D.C. Cir.), cert. denied, 305 U.S. 595 (1938); United States ex rel. Nicholson v. Dillard, 102 F.2d 94, 96 (4th Cir. 1939); United States v.

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[2] The flaw in Probation Form 12 here - that the application did not show the source of Officer Pond's information or his reasons for thinking it reliable - was not present in Polito, since the parolee was accused, inter alia, of not reporting on time, a violation within the personal knowledge of the officer making out Parole Form H-20.

Jackson, 22 F.R.D. 38, 41 (S.D.N.Y. 1958); Hyser v.Reed, 318 F.2d 225 (D.C. Cir.), cert. denied, 375 U.S. 957 (1963); United States ex rel. Randazzo v. Follette, 282 F.Supp. 10 (S.D. N.Y. 1968), aff'd in part, 418 F.2d 1319 (2d Cir. 1969), cert. denied, 402 U.S. 984 (1971). None of these cases supports the opinion, either because their facts are not comparable to those present here, or because they are all determined by the "right/privilege" distinction previously determined by this Court not to be useful.

III. THIS COURT HAS NOT YET DECLARED WHAT PROCEDURES ARE CONSTITUTIONALLY REQUIRED BEFORE A PROBATIONER CAN BE DEPRIVED OF LIBERTY BY A PROBATION REVOCATION ARREST WARRANT.

This Court has yet to set forth the constitutionally required procedures for issuance of a probation revocation arrest warrant. The petitioner respectfully suggests that the district court identified the procedures which properly accommodate both the needs of the state and the liberty interests of probationers. A probationer should not be detained without either a warrant, issued from a factual application showing probable cause, supported by oath or affirmation, or an order to show cause initiated by an affidavit. App. 54a-56a; 66a-68a. The preliminary revocation hearing mandated by Morrissey and Gagnon cannot substitute for a prior determination of probable

cause to arrest or issuance of an order to show cause.

The facts of this case show that these protections are fundamental. There must be a single unitary warrant application. The magistrate cannot accept secret memoranda and conversations. To do so would prevent impartial evaluation of probable cause, render a sworn Form 12 application useless, and make it impossible to later evaluate the warrant. This is especially true since there is virtually no pre-revocation hearing discovery. Any other rule would subject a probationer to arrest on the basis of permanently hidden falsehoods and innuendo. Only through luck did the petitioner here learn of Officer Pond's secret memorandum. App. 29a.

The Form 12 application must also be factual and under oath. Probation of-

ficers sometimes abandon the neutral helping role foreseen by Gagnon and Morrissey, and become partners with other law enforcement officers in ferreting out crime. The district court opinion shows that Officer Pond perceived himself as a member of a federal-state drug investigation team. Such officers cannot be neutral factfinders. The requirement of sworn facts prevents abuse of discretion, deters arbitrariness, and insulates the judge from improper influences. Cf. United States v. Sciuto, 531 F.2d 842, 846 (7th Cir. 1976).

The preliminary hearing is no substitute for the prior determination of probable cause. Issuance of a probation revocation arrest warrant creates the substantial likelihood that the probationer will suffer a loss of liberty.

The arrest ends the probationer's peaceful reintegration into the community and severs the rehabilitative probationer/officer relationship extolled in Morrissey, Gagnon, and other cases. Under these circumstances arbitrary action would cause the probationer substantial harm. A post-arrest hearing cannot take the place of a prior determination of probable cause.

The government interest in unsworn, non-factual warrant applications is negligible. In emergencies §3653 permits warrantless arrests "for cause." The probation officer should otherwise get a proper warrant. In cases where the officer could not swear to information showing probable cause, he could nevertheless articulate grounds for revocation under oath in an application for an order to show cause why probation should not be

revoked. See United States v. Langford, 369 F.Supp. 1107 (.D.Ill. 1973). Since no disruptive loss of liberty would occur, the preliminary hearing would be a sufficient safeguard. There is absolutely no justification for any procedure which does not require some facts under oath.

The petitioner respectfully urges that these procedures respect the liberty interest of probationers and their rights under the Fourth, Fifth and Fourteenth Amendments. The court of appeals "procedure" ignores these rights, without serving any genuine governmental interest. This Court should vindicate the rights of petitioner, and all other probationers, by implementing the procedures

devised by the district court.

Respectfully submitted,
THE PETITIONER

By_____
J. Daniel Sagarin, Esq.

A Member of the Bar of
The Supreme Court of the
United States

Dated November 18, 1980.

CERTIFICATION

This is to certify that three (3) copies of the foregoing petition, and of the Appendix thereto, were mailed first class mail, postage prepaid, to all counsel of record and the Solicitor General of the United States, this 18th day of November, 1980.

_____
J. Daniel Sagarin, Esq.